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APR 19 2004

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IO GROUP, INC.,

Plaintiff,

No. C 03-5286 MHP

v.

PIVOTAL, INC., MICHAEL WARWICK, and  
CRAIG CONLEY,

**MEMORANDUM AND ORDER RE:**  
**Motion to Dismiss**

Defendants.

On November 26, 2003, IO Group, Inc. d/b/a Titan Media filed this action against defendants Michael Warwick,<sup>1</sup> Craig Conley, and Pivotal, Inc., for copyright infringement, contributory copyright infringement, vicarious copyright infringement, and unauthorized use of a photograph. Now before the court is defendants' motion to dismiss for lack of personal jurisdiction. The court has considered the parties' arguments fully, and for the reasons set forth below, the court rules as follows.

**BACKGROUND**<sup>2</sup>

Plaintiff IO Group d/b/a Titan Media ("IO Group") produces and distributes adult entertainment products, including audiovisual works, photographs, and other content. IO Group alleges that defendants displayed at least 170 of Titan Media's copyrighted gay adult-oriented images

1 on three websites: www.keepstill.com, www.nicehole.com, and www.guystogether.com.

2 Defendants Michael Warwick and Craig Conley reside in North Carolina and are the sole  
3 shareholders of Pivotal, Inc. ("Pivotal"), a North Carolina corporation. Warwick Decl. ¶ 1, 14;  
4 Conley Decl. ¶ 1. Warwick owns the three websites, and Conley allegedly served as a webmaster for  
5 one or more of the websites. Warwick Decl. ¶ 2; Webb Decl. ¶ 4. The domain names for the  
6 websites are registered to a North Carolina address. Webb Decl. ¶¶ 7, 10, 11, 13.  
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9 Defendants concede that the copyrighted images appeared on their websites, but they argue  
10 that they are not subject to the personal jurisdiction of this court. In response, IO Group alleges that  
11 IO Group's copyrighted images have appeared on the webpages of www.keepstill.com, and that a  
12 substantial portion of the viewers of www.keepstill.com are California residents. Webb Decl. ¶¶ 2,  
13 4, 8, Exh. C. These viewers can also purchase various items on www.keepstill.com, including  
14 DVDs, CD-Roms, and books. Id. ¶¶ 4, 5, Exhs. A, C. IO Group further alleges that the servers for  
15 all three websites are maintained by NHI Networks, a California corporation, and that the servers for  
16 at least two of the websites physically reside in Los Angeles, California.<sup>3</sup> Id. ¶¶ 7, 10, 11.  
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19 Defendants also operate two additional websites. Defendants sell postcards, gifts and  
20 novelties on www.manfriends.com, an adult-oriented subscription-based website. Id. ¶ 13. They  
21 also sells books, gifts and greeting cards on www.mindfulgreetings.com, a non-adult website. Id. ¶  
22 14. Customers purchasing items from any of defendants' websites or entering into a subscription on  
23 www.manfriends.com make payments through PayPal, Inc., a California corporation. Id. ¶¶ 12-15,  
24 Exh. G. Between January 1, 2001, and December 31, 2003, purchases from persons or entities  
25 located in California comprised \$754.42 of the \$4871.51 in total purchases received through Paypal,  
26 Inc.<sup>4</sup> Warwick Supp. Decl. ¶ 3.  
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1 Defendants' websites also provide links to fourteen companies, at least five of which are  
2 located in California. Warwick Decl. ¶ 5. When consumers click on the links, they are directed to  
3 company websites from which they can purchase various items. Id. ¶¶ 5, 6. Defendants, in turn,  
4 receive commissions from the companies for purchases made by these consumers. Id. ¶¶ 5, 6.  
5 According to defendants, between January 1, 2001, and December 31, 2003, approximately ten  
6 percent of defendants' total commissions were derived from California companies. Id. ¶ 5. While  
7 the majority of these companies use intermediate payors not located in California, one California-  
8 based company pays commissions directly to defendants. Id. ¶¶ 5, 6.  
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11 On November 26, 2003, IO Group filed a complaint alleging that defendants' posting of the  
12 copyrighted images constituted direct copyright infringement, contributory copyright infringement,  
13 and vicarious infringement under section 501 of Title 17 of the United States Code; and  
14 unauthorized use of a photograph under section 3344 of the California Civil Code. See 17 U.S.C. §  
15 501; Cal. Civil Code § 3344. On February 1, 2004, defendants filed this motion to dismiss for lack  
16 of personal jurisdiction.  
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20 LEGAL STANDARD

21 Federal courts sitting in California may exercise personal jurisdiction over any nonresident to  
22 the extent permitted by due process. Harris Rutsky & Co. Ins. Serv., Inc., 328 F.3d at 1129 (citing  
23 Cal. Civ. Proc. Code § 410.10). To comport with due process, the defendant must have sufficient  
24 minimum contacts with the forum state, and maintenance of the suit must not "offend traditional  
25 notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316  
26 (1945).  
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1 Personal jurisdiction may be based on either general or specific jurisdiction. Gator.com  
2 Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1076 (9th Cir. 2003). General jurisdiction exists when the  
3 defendants' contacts with the state are "substantial" or "continuous and systematic," and it requires  
4 that the defendants' contacts approximate physical presence within the state. Bancroft & Masters,  
5 Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000) (citing Helicopteros Nacionales de  
6 Columbia, SA v. Hall, 466 U.S. 408, 415 (1984)). When determining if general jurisdiction exists,  
7 courts look to "whether the defendant makes sales, solicits or engages in business in the state, serves  
8 the state's markets, designates an agent for service of process, holds a license, or is incorporated  
9 there." Id.

12 By contrast, specific jurisdiction exists where (1) the nonresident performs some act or  
13 consummates some transaction which purposefully avails her of the privilege of conducting activities  
14 in the forum so as to invoke the benefits and protections of the state's laws; (2) the claim arises out  
15 of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction is  
16 reasonable. Cybersell v. Cybersell, 130 F.3d 414, 416 (9th Cir. 1997) (citations omitted). The  
17 purposeful availment requirement is satisfied if the defendant takes some deliberate action within the  
18 forum state or creates continuing obligations to forum residents. Id. at 417. The defendant need not  
19 be physically present in the forum state, "provided that his efforts are purposefully directed toward  
20 forum residents." Id. (quoting Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995)). When  
21 evaluating websites, courts have typically looked to the "level of interactivity and commercial nature  
22 of the exchange of information that occurs on the website to determine if sufficient contacts exist to  
23 warrant the exercise of jurisdiction." Id. (internal quotation marks omitted) (citing Zippo Mfg. Co.  
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1 v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997); Maritz v. Cybergold, Inc., 947 F.  
2 Supp. 1328, 1332-33 (E.D. Mo. 1996)).

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4 If a plaintiff wishes to establish that her claim arises out of or relates to the defendants'  
5 forum-related activities, the plaintiff must demonstrate that the contacts constituting purposeful  
6 availment gave rise to the current suit. Bancroft & Masters, 223 F.3d at 1088. In order to satisfy the  
7 requirement, the plaintiff must show that "but for" the defendants' forum-related conduct, the injury  
8 would not have occurred. Myers v. Bennett Law Offices, 238 F.3d 1068, 1075 (9th Cir. 2000); see  
9 also Panavision Int'l L.P. v. Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998). The contacts must also  
10 be "sufficiently related to the underlying causes of action" and "have some degree of proximate  
11 causation to be considered for purposes of jurisdiction." Metro-Goldwyn-Mayer Studios Inc. v.  
12 Grokster, Ltd., 423 F. Supp. 2d 1073, 1085 (C.D. Cal. 2003) (citing Doe v. American Nat'l Red  
13 Cross, 112 F.3d 1048, 1051-52 (9th Cir. 1997)).

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16 In all cases, the defendant bears the burden of demonstrating unreasonableness and must put  
17 on a "compelling case." Bancroft & Masters, Inc., 223 F.3d at 1088 (citing Burger King Corp. v.  
18 Rudzewicz, 471 U.S. 462, 476-77 (1985)). To determine reasonableness, the court must consider (1)  
19 the extent of the defendant's purposeful interjection into the forum state, (2) the burden on the  
20 defendant of defending in the forum state, (3) the extent of the conflict with the sovereignty of the  
21 defendant's state, (4) the forum state's interest in adjudicating the dispute, (5) the most efficient  
22 resolution of the controversy, (6) the importance of the forum to the plaintiff's interest in convenient  
23 and effective relief, and (7) the existence of an alternative forum. Id.

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26 The plaintiff bears the burden of demonstrating that the court possesses personal jurisdiction.  
27 Dole Food Co. Inc. v. Watts, 303 F.3d 1104, 1108 (9th Cir. 2002). Where no evidentiary hearing is  
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1 held, the plaintiff must make only a prima facie showing of jurisdiction. Harris & Rutsky Co. Ins.  
2 Services, Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1129 (9th Cir. 2003). While the plaintiff  
3 cannot rely solely on the complaint to establish personal jurisdiction, the court must take  
4 uncontroverted allegations as true and resolve conflicts between the facts contained in the parties'  
5 affidavits in favor of the plaintiff. Gator.com Corp., 341 F.3d at 1075-76 (quoting AT&T v.  
6 Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir. 1996)).  
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10 DISCUSSION

11 I. General Jurisdiction

12 Defendants' contacts with California are insufficient to confer general jurisdiction on this  
13 court. Warwick and Conley do not reside in California. Warwick Decl. ¶ 1; Conley Decl. ¶ 1.  
14 Pivotal, Inc. is a North Carolina corporation with its principal place of business located in that state.  
15 Warwick Decl. ¶ 13. The domain names for defendants' websites are registered to an address  
16 located in North Carolina. Webb Decl. ¶¶ 7, 10, 11, 13. Furthermore, defendants have not  
17 designated an agent in California, do not pay taxes in the state, do not hold licenses within the state,  
18 and are not incorporated in the state. Warwick Decl. ¶ 7; Conley Decl. ¶ 2. While defendants  
19 entered into contracts with several California corporations, received \$754.42 from purchases made  
20 by California residents, and used a server located in California, IO Group has not alleged sufficient  
21 facts to demonstrate that these contacts were either "substantial" or "continuous and systematic."  
22 See Bancroft & Masters, 223 F.3d at 1086. Absent such a showing, IO Group has failed to present a  
23 prima facie case that defendants are subject to the general jurisdiction of this court.  
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1 II. Specific Jurisdiction

2 IO Group also contends that defendants have sufficient minimum contacts with California to  
3 subject defendants to the specific jurisdiction of this court. First, IO Group notes that the vice  
4 president of Titan Media made several purchases from defendants websites while residing in  
5 California. Webb Decl. ¶ 13, 16, 17; Exhs. I, L. But “[d]efendants cannot be said to have purposely  
6 availed themselves of the protections of this forum when it was an act of someone associated with  
7 plaintiff . . . that brought defendants’ product into this forum.” Millennium Enterprises, Inc. v.  
8 Millennium Music, LP, 33 F. Supp. 2d 907, 911 (D. Or. 1999). Webb, as vice president of Titan  
9 Media, is directly associated with the plaintiff in this action. IO Group’s attempt to manufacture  
10 jurisdiction through Webb’s purchases cannot demonstrate that defendants purposefully availed  
11 themselves of the forum state.<sup>5</sup>

12 Defendants’ other contacts with California are sufficient, however, to satisfy the minimum  
13 contacts analysis. In particular, defendants’ websites were interactive, not passive, and defendants’  
14 contacts with California via the websites were commercial in nature. See Cybersell, 130 F.3d at 417.  
15 The fact that consumers can purchase products directly from defendants’ websites through a  
16 California-based third-party payor, PayPal, Inc, indicates a relatively high level of interactivity. Id.  
17 ¶¶ 12, 13, 15; Exh. G. Defendants also have sufficient commercial contacts with California to  
18 warrant the exercise of jurisdiction. Between January 1, 2001, and December 31, 2003, defendants  
19 received \$754.42 from purchases made by California residents. Warwick Supp. Decl. ¶ 3.  
20 Defendants have also entered into commission-based contracts with at least five California-based  
21 corporations, and they receive approximately ten percent of their total commissions from these  
22 companies. Warwick Decl. ¶ 5. Finally, defendants’ servers were allegedly located in California.  
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1 Webb Decl. ¶ 7, 10, 11. Based on these facts, IO Group has alleged sufficient minimum contacts  
2 with California to demonstrate that defendants purposefully availed themselves of the benefits and  
3 protections of California's laws.  
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5 In addition, IO Group's copyright infringement claims arose out of defendants' forum-related  
6 contacts. See Bancroft & Masters, 223 F.3d at 1088. Defendants' forum-related activities included  
7 sales to California residents. Warwick Supp. Decl. ¶ 3. Viewers can purchase various items,  
8 including DVDs, CD-Roms and books, from the same website, www.keepstill.com, upon which IO  
9 Group's copyrighted images were allegedly displayed. Webb Decl. ¶¶ 2, 4, Exh. D. Based on this  
10 evidence, California purchasers could have viewed and made purchases in connection with the  
11 viewing of IO Group's copyrighted images. Thus, IO Group has made a prima facie case that these  
12 purchases were sufficiently related to the use of IO Group's copyrighted images to satisfy the  
13 relatedness requirement. See Harris & Rutsky Co., Ins. Services Inc., 328 F.3d at 1129.  
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15 The courts' exercise of jurisdiction in this case is also reasonable. First, the extent of  
16 defendants' contacts with California are sufficient to warrant jurisdiction. Defendants made sales to  
17 California residents and entered into contracts with California corporations. Second, the burden on  
18 the defendants in defending the suit in California would not be so great an inconvenience as to  
19 constitute a deprivation of due process. See Panavision Int'l L.P., 141 F.3d at 1323 ("[I]n this era of  
20 fax machines and discount air travel, requiring [the defendant] to litigate in California is not  
21 constitutionally unreasonable.") (citations omitted). Third, the exercise of jurisdiction in California  
22 does not implicate sovereignty concerns in North Carolina, especially where, as here, the claims are  
23 primarily based upon federal law. Id.; see also Colt Studio, Inc. v. Badpuppy Enterprise, 75 F. Supp.  
24 2d 1104, 1110 (C.D. Cal. 1999). Fourth, California maintains a strong interest in "protecting its  
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1 citizens from the wrongful acts of nonresident defendants.” Figi Graphics, Inc. v. Dollar General  
2 Corp., 33 F. Supp. 2d 1263, 1268 (S.D. Cal. 1998) (citing Ziegler v. Indian River County, 64 F.3d  
3 470, 475 (9th Cir. 1995)). That interest is sufficiently strong in this case because IO Group is a  
4 California corporation. Fifth, evidence and witnesses are located in both California and North  
5 Carolina, so there would be no particular advantage to litigating this case in North Carolina. See  
6 Panavision Int’l L.P., 141 F.3d at 1323 (holding that this factor is “no longer weighed heavily given  
7 the modern advances in communication and transportation.”). Sixth, while IO Group argues that  
8 resolving this dispute in North Carolina would impinge on its interests in convenient and effective  
9 relief because it would have to hire outside counsel, the court finds this factor to be neutral. Seventh,  
10 despite the fact that plaintiff concedes that the federal courts of North Carolina would present an  
11 alternative forum, defendant has not made out a “compelling case” that the exercise of jurisdiction  
12 would “offend traditional notions of fair play and substantial justice.” See Bancroft & Masters, 223  
13 F.3d at 1088. The exercise of personal jurisdiction over defendants in this case is reasonable.

17 Finally, this court may also exercise specific jurisdiction over defendants under the Calder  
18 effects test. See Panavision v. Int’l, LP v. Toeppen, 141 F.3d 1316, 1321 (9th Cir. 1998) (citing  
19 Calder v. Jones, 465 U.S. 783 (1984)). Under Calder, personal jurisdiction can be based upon “(1)  
20 intentional actions, (2) expressly aimed at the forum state, (3) causing harm, the brunt of which is  
21 suffered—and which the defendant knows would likely be suffered—in the forum state.” Id. (citing  
22 Core-Vent Corp. v. Nobel Ind. AB, 11 F.3d 1482, 1486 (9th Cir. 1993)). Copyright infringement  
23 may be characterized as an intentional tort. See Columbia Pictures Television v. Krypton Broad. of  
24 Birmingham, Inc., 106 F.3d 284, 289 (9th Cir. 1997), overruled on other grounds by Feltner v.  
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1 Columbia Pictures Television, 523 U.S. 340 (1998); Janel Russel Designs, Inc. v. Mendelson &  
2 Assoc., Inc., 114 F. Supp. 2d 856, 862 (D. Minn. 2000).


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4 In this case, defendants intentionally placed IO Group's copyrighted images on one or more  
5 of their websites, attempting to profit from sales to California residents. IO Group d/b/a Titan  
6 Media, a corporation with its principal place of business located in California, suffered the brunt of  
7 the harm resulting from defendants' infringement. See Panavision, 141 F.3d at 1322, n.2 (citing  
8 Core-Vent, 11 F.3d at 1487). Defendants argue that they did not know Titan Media was located in  
9 California prior to receiving a cease and desist letter from the company's attorney. Warwick Decl. ¶  
10 12, Exh. A. Following the receipt of the cease and desist letter, however, defendants allegedly  
11 continued to display plaintiff's copyrighted images on their websites. Warwick Decl., Exhs. C, D.  
12 In response to the letter, defendants argued not that they did not intentionally place the copyrighted  
13 images on their websites, but rather that the placement of the images with links to websites where  
14 consumers could purchase Titan Media's products constituted fair use under copyright law. See  
15 Sperlein Decl., Exh. A. IO Group also alleges that all of the studios in the gay adult entertainment  
16 industry are located in California. Webb Decl. ¶ 21. As a result, defendants knew that the brunt of  
17 the harm resulting from their infringement would likely be felt in California. Based on this evidence,  
18 IO Group has adequately demonstrated that defendants published images belonging to a California  
19 company, affecting an industry primarily centered in California, knowing that harm would likely be  
20 felt in that state. Construing these facts in a light most favorable to the plaintiff, IO Group has made  
21 a prima facie case that defendants are subject to the personal jurisdiction of this court under Calder.  
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1 CONCLUSION

2 For the foregoing reasons, the court DENIES defendants' motion to dismiss IO Group's  
3 claims for lack of personal jurisdiction.  
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6 IT IS SO ORDERED.

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8 Dated:

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10 MARILYN HALL PATEL  
11 Chief Judge  
12 United States District Court  
13 Northern District of California  
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ENDNOTES

1. Plaintiff erroneously spelled Warwick's name as "Warewick" in its complaint.
2. Unless otherwise specified, facts are taken from the parties' moving papers.
3. While defendants contend that the servers were never located in Los Angeles, California, Warwick Decl. In Support of Reply Brief ¶ 20, 21, for purposes of a motion to dismiss for lack of personal jurisdiction, contested facts must be resolved in favor of the plaintiff. Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1076-77 (9th Cir. 2003) (citations omitted).
4. Warwick stated in his original declaration that "Nothing is sold on or from the Pages." Warwick Decl. ¶ 4. Following a purchase by plaintiff, Warwick submitted a supplemental declaration. Warwick Supp. Decl. ¶ 1. Warwick now claims that he realized that his previous declaration had "failed to identify a 'donation' feature present on two of the Pages that allows viewers to make donations to help offset the costs of maintaining the site on highspeed broadband so that the site can remain free." Warwick Supp. Decl. ¶ 1. A variety of items, including DVDs, books and magazines, could be purchased on defendants' websites for a specified "donation." Webb Decl., Exhs. A, C, J. These items were clearly for sale, and Warwick's characterization of such sales as "donations" rather than "purchases" is misleading. This type of outright dishonesty will not be tolerated by this court.
5. IO Group also contends that defendants purposefully availed themselves of forum state by entering into contracts with other companies wherein defendants agreed to submit to the personal jurisdiction of the United States District Court for the Northern District of California. IO Group does not allege that it entered into a similar contract with defendants. While this argument may be relevant in a dispute involving one of these companies, it is unavailing for purposes of this dispute. See Grokster, 243 F.3d at 1085 ("[T]he fact that [defendant] may have executed or assumed contracts containing California forum selection or choice of law provision is immaterial on this point with respect to contracts that are essentially unrelated to Plaintiffs' claims.").